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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 297

DIXILYN DRILLING CORPORATION,
Petitioner,

versus

CRESCENT TOWING & SALVAGE COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT

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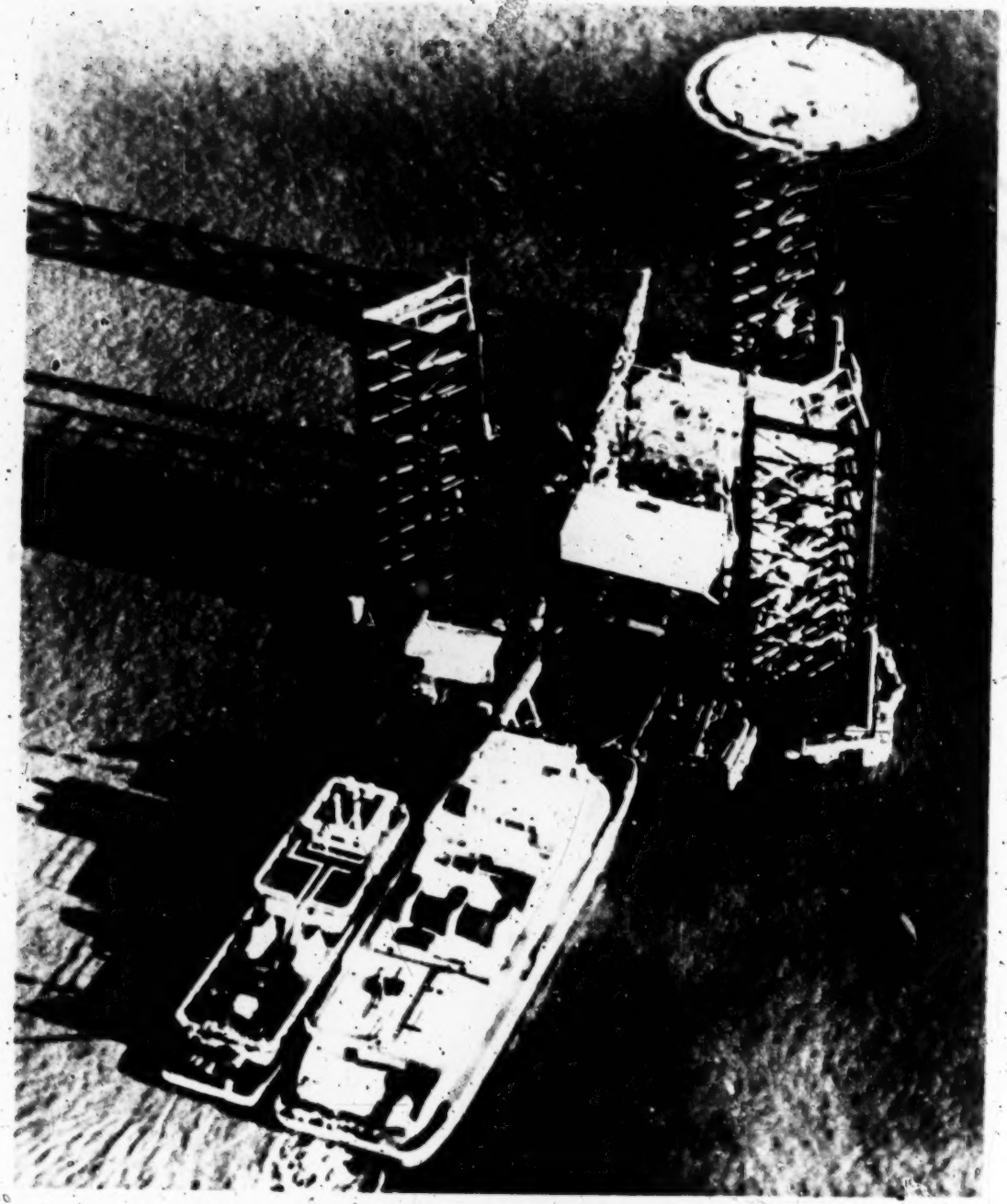

DIXILYN EXHIBIT 2

The above picture was taken after JULIE ANN left the LeTourneau yard on the morning of December 29, prior to the time that Crescent's Tug ORLEANS met the flotilla and prior to the collision with the Bridge.

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BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT

This suit originated with the filing of a libel in Admiralty in the Southern District of Mississippi by the Mississippi and Louisiana Highway Departments against Dixilyn Drilling Company (Dixilyn) and Crescent Towing & Salvage Company, Inc. (Crescent) for damages sustained by the Natchez-Vidalia Bridge over the Mississippi River when it was struck by Dixilyn's drilling barge *Julie Ann*, which was being towed downriver from Vicksburg to New Orleans by Crescent. Both respondents answered the suit denying negligence and liability. In addition, Crescent simultaneously filed a petition under the 56th Admiralty

Rule charging that the proximate cause of the damage to the bridge was solely due to the negligent operation of the legs of the drilling barge by employees of Dixilyn. Crescent further plead that Dixilyn had agreed to indemnify it for any claim arising out of the towage and had agreed in the towage contract to procure insurance which would inure to the benefit of Crescent, and sought a recovery over from Dixilyn in the event that it was cast.

Prior to trial, the respondents stipulated that one or the other or both were responsible for the damages, and with the approval of the court, satisfied the claim of the libellant and agreed to litigate between themselves the question of the ultimate responsibility for the damages. The trial resulted in the District Court finding that Crescent's negligence was the proximate cause of the damage and that no indemnity or release was expressed or implied in the contract of towage. A decree was accordingly entered for Dixilyn.[1]

The Court of Appeals for the Fifth Circuit did not reach the factual issue. It found that the towage contract contained an assumption of liability and an agreement to cause Dixilyn's insurance to inure to the benefit of Crescent; it held the stipulation binding on Dixilyn and reversed, with an instruction to enter judgment consistent with its opinion.[2]

On the petition of Dixilyn, this Court granted certiorari limited to the two questions presented by the application: the validity *vel non* of the contract and the propriety of the interpretation placed upon it by the Court of Appeals. The factual issue of negligence accordingly is not before Your Honors at this time.

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[1] Record, p. 151.
[2] Record, p. 153 ff.

STATEMENT OF FACT

In the belief that the statement contained in Dixilyn's brief is deficient, and although the entire controversy between the parties is not presently before the Court, it is deemed proper to delineate the nature of the towage contract which was entered into by the parties and the rights and obligations which each sought to impose upon the other by virtue of the contract. To this end, there has been included in this brief, as the frontispiece, Dixilyn's Exhibit 2, which was introduced in evidence on the trial and which, although not contained in the abbreviated record filed herein, is included so that the Court may recognize the unusual nature of the towage involved and the type of craft referred to when the words "drilling barge" are used as descriptive of the *Julie Ann*. The Court of Appeals properly described the drilling barge as follows:

> "The *Julie Ann*, constructed at the LeTourneau plant at Vicksburg, is a self-contained, submersible type drilling rig. She is 193 feet long, 151 feet wide, and has a displacement of 2500 tons. She is triangular in shape, with legs of open truss steel frame construction 175 feet long set on each corner of the triangle. Approximately 30 feet of the legs had not been installed at the time of the collision. The lower end of each leg consists of spud tanks or feet 35 feet in diameter and about 35 feet in height. The legs provide a tripod on which the hull of the barge can be raised or lowered for drilling operations or for navigational purposes. The legs are operated from a control room situated above the quarters. They are lowered and retracted by three 60 cycle motors powered by three generators, any one of which is capable of lowering or retracting all three legs simultaneously. The legs are controlled by three levers, all of which can be manipulated so that each leg can be raised or lowered by itself or with one or both of the other legs.

> "The barge hull itself is 20 feet in depth (from main deck to bottom), and at the time of the collision the hull afloat was drawing approximately 13 feet. Below the main deck is a machinery deck containing a complex of equipment and tanks necessary for drilling operations, including mud tanks, water tanks, and fuel tanks. On the main deck are located draw works, pipe racks and anchor winches. Two story living quarters are situated above the main deck, completely equipped as spacious and comfortable accommodations for 45 men, all air-conditioned and equipped with a modern galley, laundry and recreation lounge. The rig is a complete self-contained unit, capable of drilling in more than 100 feet of water, and includes in her equipment slush pumps, a Schlumberger unit, cement unit, mud lab, water evaporator, mud pits and mixers, jets and guns, six diesel engines, and six electric generators."[3]

Recognizing the difficulty in navigating and maneuvering the bulky tow downriver, which required the lowering and raising of the legs to pass under several power lines and at least three bridges over the Mississippi, Crescent's representatives negotiated a contract with the representatives of Dixilyn and confirmed the understanding by letter dated December 19, 1957, to which there was attached a so-called towage release clause. The letter is as follows:

> "We wish to confirm our recent conversation including Mr. M. O. Bering, Jr. and Mr. Mike Smith, in which we discussed the towing of the 'JULIE ANN' from Vicksburg to our Fleet Landing in the New Orleans harbor.
>
> "We understand that the 'JULIE ANN' will be ready to leave Vicksburg the morning of December 26th and we expect to be in Vicksburg ready to

[3] Record, p. 154.

> move her at that time; we contemplate using two river pushboats (towboats) of substantial horsepower and one tugboat. For the trip from New Orleans to her offshore location, seagoing tugboats will be used.
>
> "This tow will be performed by Crescent subject to towage release clause, copy of which is attached and is part of our agreement with you; it being mutually understood and agreed that in consideration of including this clause lower rates prevail. It is also necessary that we (Crescent Towing & Salvage Co., Inc.) be included in the 'JULIE ANN' hull and P & I Insurance coverage and we will appreciate receiving a letter or telegram from your underwriters or brokers to this effect as soon as possible.
>
> "We will continue to keep in touch with your office and know that you will advise us if there is any change in the anticipated readiness of the rig at Vicksburg. We appreciate very much your calling upon us to tow the 'JULIE ANN'.[4]

Dixilyn found the release clause attached to the letter unacceptable; Crescent therepon supplemented the original letter with another letter dated December 23, one sentence of which was also found unacceptable by Dixilyn. That sentence was stricken and the letter was then rewritten and endorsed "Approved" by Dixilyn and returned to Crescent. The second letter with the stricken portion indicated is as follows:

> "With further reference to our undertaking to tow your drilling barge 'JULIE ANN' from Vicksburg to our Fleet Landing in New Orleans and then down the Mississippi River into the Gulf, we confirm that the following additional clause shall be included in the contract as part of the consideration for our undertaking the towage:

[4] Record, p. 157.

"You agree to indemnify us, our tugs and equipment and all other parties taking part in the towage and their equipment and our and their underwriters of and from any and all liability or claims which may arise out of the towage of the drilling barge. It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us from any liability for account of your underwriters and that any damage claims urged by third parties as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for your account and account of your underwriters.

"It is further understood that the amount of the insurance protection which you have in force equals the value of the hull of the barge as to hull insurance and amounts to four million dollars as to third party claims.

"If the foregoing meets with your approval and represents this portion of our agreement, please sign and return to us the attached three copies of this letter, retaining the original and the other copy for your files.[5]

Crescent's position is that the evidence clearly shows that Dixilyn was fully apprised of the nature of the agreement under which the drilling barge was to be moved. It is further Crescent's position that the two letters constituted the terms of the contract between the parties, and that those terms clearly and unequivocally afforded Crescent the benefit of Dixilyn's insurance and granted Crescent an indemnification against claims for damages arising during the towage, howsoever arising. Accordingly, Crescent claims that Dixilyn bound itself to reimburse Crescent for Crescent's half of the damages paid to the bridge owners.

On the contrary, Dixilyn takes the position that the

[5] Record, p. 159.

meaning of the contract is vague and indefinite insofar as the indemnification and the agreement to afford the benefit of its insurance to Crescent are concerned, and that in order for a contract to shift responsibility for negligent acts from one party to the other where negligence is involved, the word "negligence" must be used to connote the intention of the parties: since that "talismanic" word[6] was not used, the contract should be interpreted as not shifting responsibility for Crescent's negligent acts to Dixilyn. The foregoing argument is based upon the presumption, erroneous, we submit, but presently not before the Court, that the accident was caused by the sole negligence of Crescent.[7]

Secondly, Dixilyn argues that even if the contract were to be interpreted as shifting liability for negligence from Crescent and its underwriters to Dixilyn and its underwriters, such a shifting is reprobated by the *Bisso v. Inland Waterways Corporation* decision.[8]

ARGUMENT

Petitioner's application for certiorari and its brief in support thereof present to the Court two questions, the first being addressed to the validity of the contract provision under the *Bisso* rule, and the second being addressed to the propriety of the interpretation placed upon the towage contract by the Court of Appeals for the Fifth Circuit. It is submitted that a logical development of the argument herein requires that the second point be dealt

[6] *Batson-Cook Co. v. Industrial Steel Erectors*, 257 F. 2d 410, 412 (5th Cir. 1958). It is to be noted that in this case the "talismanic" word "negligent" was not used in an indemnification agreement, and the court was unable to find "the equivalent clear intent in other language of the agreement."

[7] The findings of the lower court were attacked on appeal to the Court of Appeals, which, although not reaching a decision on the findings, did indicate that if such a review had to be made the court would have been confronted "with an extremely difficult decision." (Record, p. 154)

[8] 349 U.S. 85 (1955).

with first, and accordingly, the first portion of this brief is addressed to the question of whether or not the contract between the parties should be interpreted as shifting liability for negligent damage to the property of third parties from Crescent and its underwriters to Dixilyn and its underwriters.

THE INTERPRETATION OF THE CONTRACT

The contract between the parties consists of letters sent by Crescent to Dixilyn, a copy of the second of the letters having been endorsed "Approved" by Dixilyn. Stripping out of the letters the matter not here material, it appears that Crescent agreed to tow the drilling barge *Julie Ann* from Vicksburg to its Fleet Landing in New Orleans by the use of two river pushboats and one of its tugs. The towage was to be performed subject to a towage release clause, in consideration for which lower towing rates would prevail. Crescent further required that it be named in the existing insurance on the *Julie Ann*.[9]

Such was the substance of the first letter. The second letter, commencing with the words, "With *further* reference to our undertaking to tow this drilling barge * * * ", confirmed that an *additional* clause would be included in the contract to the effect that "any damage claims urged by third parties shall be for your (Dixilyn's) account and account of your (Dixilyn's) underwriters." This letter further confirmed the amount of Dixilyn's liability insurance to be four million dollars, and closes with the sentence, "If the foregoing meets with your approval and represents *this portion* of our agreement, please sign and return to us the attached three copies of this letter, retaining the original and the other copy for your files." (Emphasis added)

[9] See note 4, *supra* and accompanying text.

It is our submission that not only was the shifting of ultimate liability for any claims arising out of the towage expressly stated, but that the object and intent of the parties in confecting the agreement was clear and unequivocal. Certainly, Dixilyn in its discussion with its underwriters was advised as to and understood the clear import of the contract.[10] If the contract was not intended to shift liability for third party claims, why would there be an express statement to the effect that Dixilyn carried four million dollars of insurance "as to third party claims"? Obviously, there would be no need to refer to insurance against third party claims if it were not the intent of the parties to have the insurance there referred to respond to such claims. If Crescent were to be liable for all third party claims, then it would have no interest in the amount of insurance carried by Dixilyn, whether the negligence of Dixilyn or that of Crescent were the proximate cause of the damages.

Even clearer is the language of the contract to the effect that "any damage claims urged by third parties * * * shall be for your account and account of your underwriters." This is plain, understandable businessman's English, not "legalese." There was no need to refer to third party claims resulting specifically from Crescent's negligence; *any* damage claims urged by third parties arising out of the towage were to be for the account of Dixilyn and Dixilyn's underwriters. In other words, the plain and crystal clear language of the contract, as well as the intention of both parties to the contract, clearly and unequivocally shifts liability for third party claims, howsoever arising, from Crescent to Dixilyn. If the claim were to have sprung from Dixilyn's negligence; Crescent would have no liability; its interest must have stemmed

[10] Record, p. 108.

from the understanding that Dixilyn's insurance was to cover "any damage claims."

Crescent's corporate officer who negotiated the contract of towage testified without equivocation that the towing of the barge was particularly dangerous and hazardous and that since this was not an ordinary towage movement such as would usually be undertaken by Crescent, a release of some type was required.[11]

The same testimony was elicited, although with difficulty, from the Dixilyn official who approved the agreement on behalf of that company, when he said in answer to a question on cross-examination that he understood that Crescent was not to be responsible for damages sustained by third parties during the course of the towage.[12]

The thrust of Dixilyn's argument is that the contract did not clearly state the position of the parties, and that if the contract is not clear and unequivocal, the Court of Appeals should have found that the provision to shift liability from Crescent to Dixilyn was null and void. It claims that the court below erred in applying the general doctrine that

> " 'The cardinal rule of interpretation of indemnity contracts is the same as in the case of other types of contracts, namely, the ascertainment of the intent of the parties.' Annotation 175 A.L.R. 29." [13]

There are two answers to this argument: The first conclusive answer is that findings as to the interpretation to be accorded a contract are findings of fact, and, as Mr. Justice Holmes said,

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[11] Record, p. 87, 88.
[12] Record, p. 127.
[13] Opinion below, Record, p. 163.

> "We do not grant a certiorari to review evidence and discuss specific facts."[14]

Although there is presented here no conflict in the testimony of witnesses as to the intention of the parties, this Court would have to analyze the respective contentions of Dixilyn and Crescent, and would have to study the transcript and generally try the case *de novo* in order to resolve the factual issue, for:

> "The question of interpretation of language and conduct—the question of what is the meaning that should be given by a court to the words of a contract, is a question of fact, not a question of law."[15]

This Court is far too busy to be put upon by litigants who desire a redetermination of an adverse decision on factual issues. As Mr. Justice Jackson stated,

> "The hearing of contentions as to disputed facts; the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put upon them by the parties and reduction of the mass of conflicting contention as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine."[16]

In a case involving a factual issue, those facts were mixed with a legal point when Your Honors granted certiorari in *Rogers v. Missouri Pacific Railroad Company*.[17] Mr. Justice Frankfurter gave written reasons why he believed the writ to have been improvidently granted, there having been presented to the Court what he conceived to be solely an issue of fact.[18] It is respect-

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[14] *United States v. Johnston*, 268 U.S. 220, 227 (1925).
[15] Corbin, Contracts, § 54 (1960).
[16] *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256 (1948).
[17] 352 U.S. 500 (1957).
[18] *Id.* at 524; *cf. Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 332.

fully submitted that Your Honors should not disturb the finding of the court below under any circumstances, whether or not it was erroneous, because a factual issue alone is involved.

Alternatively, it is submitted that the decision below was clearly correct. Dixilyn argues that two well-established rules of law were disregarded by the court below: (1) It failed to construe the contract against the party who drafted it, and (2) it failed to apply the rule that an indemnity agreement is to be strictly construed in favor of the indemnitor. Assuming, *arguendo*, that the agreement purports only to constitute an indemnity agreement, the overriding and most important principle in aid to the interpretation of a contract is the age-old theory that the court should look to the intent of the parties and should not attempt to rewrite a contract rather than to enforce it as written.

These rules of construction are, of course, inapplicable where, as here, the contract is clear and unequivocal. The court below has found the intent of the parties to be consistent with the written words of the contract. Dixilyn overlooked this, and in the course of developing its argument, Dixilyn fails to cite the leading case decided by this Court in the past 20 years on the interpretation of an indemnity agreement. In *Porello*,[19] this Court remanded to the district court for the taking of evidence as to intent a case involving the interpretation of a contract providing for an indemnity where the word "negligent" was used, but where the Court could not decide if sole negligence or joint negligence on the part of the indemnitee was intended to be covered.[20]

[19] *American Stevedores, Inc. v. Porello*, 330 U.S. 446 (1947).

[20] *Cf. Muratore v. U. S.*, 100 F. Supp. 276, 285 (S.D. N.Y., 1951) on the problem of interpreting an indemnity contract, and Judge Clark's analysis *A/S J. Ludwig Mowinckles Rederi v. Commercial Stevedoring Co., Inc.*, 256 F. 2d 227, 229 (2nd Cir. 1958).

Moreover, it would seem that the rule for which Dixilyn contends is the old rule, which has given way to a complete reversal by virtue of the trend of the modern jurisprudence. There is no present reason why a contract of indemnity should be interpreted any differently from any other kind of contract. As pointed out above, the paramount aim of a court in interpreting a contract is to find the intent of the parties so that the contract can be enforced as the parties wished. Courts should never rewrite contracts. The old rule which gave rise to the strict construction of indemnity agreements, we submit, found its genesis in the fact that certain types of such contracts were held to be illegal as against public policy, but the jurisprudence has completely changed. This statement is well pointed up by an examination of *American Jurisprudence*, where the text of the permanent, bound edition published in 1940 reads:

> "The authorities are conflicting as to the validity of an agreement to indemnify against the negligence of the indemnitee, the majority holding such a contract to be void."[21]

The 1962 Cumulative Pocket Part of this volume, however, points out that "A contrary view is taken by the great majority of modern cases", and further states that "According to the great weight of modern authority, the parties to indemnity contracts may validly bind themselves by contract to indemnify the indemnitee against or relieve from liability on account of his own future acts."[22]

What Dixilyn complains of is that the Court of Appeals for the Fifth Circuit has determined it will follow the modern rather than the old jurisprudence. This

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[21] 27 Am. Jur., *Indemnity*, § 9.

[22] Accord: 42 C.J.S., Indemnity, § 7 (1944): "The parties may lawfully bind themselves by contract to indemnify against or relieve from liability on account of future acts of negligence * * * ".

rationale, however, was not originally announced in the instant case. The court's first decision adopting the "modern" view was rendered on November 17, 1961, when *Jacksonville Terminal*[23] was decided. An application for a rehearing was made and was denied. Likewise, certiorari was applied for, and this too was denied on April 23, 1962.[24]

Because of the stress that has been placed upon the prior jurisprudence of the Court of Appeals for the Fifth Circuit, it is believed that it is proper for us to quote from the opinion in *Jacksonville Terminal* at length. It is to be noted that Chief Judge Tuttle, who wrote the opinion for the court, was well aware of the two views which were pressed upon him by the adversaries in *Jacksonville Terminal* and that the old rule was recognized but was not followed because of the opinion of the court that it rested " • • • on an unsound and dangerous foundation." The opinion continues:

> "It presumes, first of all, that one party's assumption of liability for losses due to another's negligence is an 'unusual' and 'hazardous' undertaking. We cannot agree. In the light of modern conditions, we perceive little justification for so characterizing the indemnitor's obligation. Insurance companies assume this obligation every day, especially in connection with automobile liability policies. And, it is common knowledge that the device of insuring against one's own negligence through indemnity contracts is frequently employed in other business ventures.
>
> "Perhaps more important, even assuming that the burden imposed on the indemnitor is 'unusual' or 'hazardous', the majority rule presumes that

[23] *Jacksonville Terminal Co. v. Railway Express Agency, Inc.*, 296 F. 2d 256.

[24] ..... U. S. ....., 82 S. Ct. 949.

courts have the power to alleviate or eliminate this burden by construing the indemnity agreement in a manner which is patently inconsistent with the plain and clear meaning of the language employed by the contracting parties. This is a dangerous and unwarranted extension of the judicial function. If a court feels that a contract imposes an extraordinary liability on one of the parties, it may, in certain instances, pronounce the contract void as being contrary to public policy. But where, as here, a contract does not violate public policy, we have no authority to achieve the same result by concluding that the parties did not really mean what the unambiguous language of their agreement imports.

"There was no mistake of fact or law which induced either of the parties to enter into this contract. There was no fraud or duress. The parties were admittedly of equal bargaining power. Indeed, REA itself drafted the terms of the indemnity clause. In this situation, we must adhere to the wise and well established principle that the court will not make a contract for the parties. REA freely consented to indemnify JTC for 'all losses, etc.' arising in connection with its use and occupation of the terminal premises. It did not see fit to exclude losses caused by JTC's negligence. It cannot now complain of the consequences." (Footnotes omitted)

It is respectfully submitted that the contract should be interpreted as written and as the parties intended: that Dixilyn assumed responsibility for *any* damage claims which might be urged by third parties arising out of the towage of the drilling barge and that such claims should be for account of Dixilyn and its underwriters. The decision of the court below was right on this phase of the question and should be left undisturbed.

THE VALIDITY OF THE CONTRACT CLAUSE UNDER THE BISSO RULE

Although petitioner framed the "question presented" in its application for certiorari as one simple question, in fact it has three major facets, each of which, we submit, require affirmative answers as to the validity of the contract clauses. The question should be broken down into three separate questions as follows:

(1) Does the contract between the parties provide for a shift of the liability for damages to the property of third parties from the towing tug and its underwriters to the towed barge and its underwriters by affording the tug the benefit of the barge's insurance, and if so, is such an arrangement valid?

(2) Does the contract provide for a shift of the liability for damage to the property of third parties from the tug to the barge in consideration of the performance of the towage at a reduced rate, and if so, is such an arrangement valid?

(3) Does the contract between the parties provide for a shift of the liability for damage to property of third parties from the tug to the barge, and, if so, is such a provision valid within the framework of the instant situation: a hazardous and unmaneuverable tow of an extraordinarily high value being towed through hazardous areas and at extraordinary risk both as to amount and as to navigational problems expected to be encountered?

Petitioner's brief is addressed only to the problems inherent in the third of the foregoing questions. The possibility of having petitioner's insurance inure to the benefit of the tower, and the question of whether a release agreement might be arranged in consideration of a reduction in rate are completely ignored. We submit that the

contract can be supported on both of these grounds, as well as on the third ground alone.

The record shows that both Dixilyn and Crescent had in effect ample insurance on their respective craft to cover the entire amount of the damage to the bridge. The record also shows, however, that Crescent quoted Dixilyn its usual hourly rate for routine towing performed in the harbor of New Orleans, which does not involve unusually hazardous situations and which does not involve moving craft of such extraordinarily high values. Finally, the record shows that the premiums for marine insurance are computed largely on the basis of loss experience, and if in the course of a towage, a four million dollar drilling barge were to be lost, the four million dollar loss would be debited against the Crescent insurance record.[25] It would take years of premiums at much higher than current rates for such a loss record to be absorbed and for the premiums to return to what would be classified as the norm. During these years, Crescent would not be competitive with other towers, who would be operating at a substantially lesser cost because of the fact that insurance rates amount to such a high percentage of the overall expense of a marine operation.

Crescent had experience in moving drilling barges on prior occasions to the instant one, and it has been shown that the premium for a policy of trip insurance on the Barge *Julie Ann* for this one voyage would approximate $40,000.[26] Such a premium would make the movement of the barge almost prohibitive. It was probably for this reason that Dixilyn voluntarily chose to assume responsibility for damages rather than permit Crescent to take out a special trip policy on the barge. Crescent's charge of its stipulated harbor rate of $35 per hour for its tug

[25] Record, p. 97.
[26] *Ibid.*

was based upon the fact that the extraordinary perils and the extraordinary value at risk could not affect its insurance rates, because damage claims stemming from the movement would not be chargeable to the Crescent experience rating.

Dixilyn attempts to hide behind its purported inexperience in the field as an excuse for its failure to understand its agreement. It is obvious from the record, however, that Dixilyn was in close contact with its underwriters during the negotiations, and indeed had the representatives of the underwriters sitting in on all of the conferences and discussing all of the terms of the movement with Crescent. If it were not understood by the underwriters that losses were to be borne by them, on what theory would they be interested in the negotiations?

Moreover, modern business conditions, as Chief Judge Tuttle pointed out in *Jacksonville Terminal*,[27] have come to a point where dual insurance costs have been eliminated in many fields through the means of indemnifications and the cross-naming of parties in insurance policies. There was no reason why dual insurance should be carried, because Dixilyn already had insurance of its own which could be endorsed to cover any claim which might ensue, and if Crescent took out a special trip policy on the drilling barge, nothing would have been accomplished except to add to the cost of the movement.

Such arrangements are by no means uncommon in the area of this contract, as is evidenced by the fact that Dixilyn's Vice President testified that he had executed many contracts with major oil companies covering the drilling of oil wells and that every one of those contracts contained hold harmless and indemnity agreements.[28] There

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[27] *Supra* note 23 and accompanying text.
[28] Record, p. 105.

was, therefore, nothing novel about an indemnity agreement to Dixilyn, and the fact that there was a shift of liabilities from Crescent to Dixilyn in the instant case was in conformity with, not in contravention of, the usual business policy in this area. We submit there is no reason whatsoever which has been advanced by Dixilyn for the Court holding that it is improper or illegal for Dixilyn, under these circumstances, to afford to Crescent the coverage of its existing insurance. Ample business purpose existed for the arrangement, a good and valid consideration flowed to Dixilyn, and, we submit, no public policy exists which could be invoked as a bar to the agreement, freely arrived at by two parties negotiating without coercion and at arm's length.

The Court will understand that the contract between the parties provided that the shifting of liability from Crescent to Dixilyn was in consideration of lower rates for the towage. Admittedly, there was no quotation of the lower rate or even a mention of a figure on which Dixilyn could put its finger as in the case of a filed tariff of a common carrier; however, it is equally clear that Crescent contemplated obtaining a trip insurance policy on the drilling barge if it were not released from liability, and hence the cost of the policy, which would have ranged in the neighborhood of $40,000[29] would have been charged to Dixilyn in addition to the ordinary towage rate were the release not available to Crescent.

There would seem to be nothing strange about such a situation. Its counterpart is found in the tariffs of numerous common carriers where release values are set up in the tariffs or bills of lading of the carriers according to a shipper a limited right to recoup cargo damage from the carrier based on valuation. Without attempting

[29] Record, p. 97.

to labor the point, we simply point out that the whole rating system of charges by common carriers for the transportation of shipments is geared to valuation clauses, and that limitations on the liability of carriers based upon such valuations uniformly have been authorized by the Congress and held valid by the courts for many years.[30]

Moreover, it should be pointed out that the Carriage of Goods by Sea Act limits the liability of a carrier to $500 per package.[31] There is, therefore, nothing unusual about a water transportation contract including valuation clauses. The custom of the trade seems to be firmly established and the practice has been approved for many years by the Interstate Commerce Commission as well as being authorized by the applicable Congressional enactment relative to waterborne shipments.[32] It is our submission that there is nothing whatsoever in our law, whether statutory or judge-made, which would preclude a tower from adopting a system of rating its charges for towage. If the carrier may do so, certainly the tower should be able to take a like position.

Assuming that the contract between the parties simply provides for a release from liability for negligence on the part of Crescent, it is our submission that there is nothing in *Bisso* which precludes the enforcement of such a clause in the towage contract.

It would serve no useful purpose to attempt to develop the background of release clauses in towage agreements. That subject is covered fully in the majority and minority

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[30] Second Cummins Amendment, Act of August 19, 1916, 49 U.S.C. § 20(11); *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913); and *Southeastern Express Co. v. Pastime Amusement Co.*, 299 U.S. 28 (1936), where the Court said:

> "The underlying principle is that the carrier is entitled to base rates upon value and that its compensation should bear a reasonable relation to the risk and responsibility assumed."

[31] Act of April 16, 1936, 46 U.S.C. 1304(5).

[32] See Mr. Justice Harlan's opinion in *Southwestern Sugar, f.* 9, 360 U.S. at 420.

opinions in the *Bisso* and *Winding Gulf*[33] cases. Those decisions, announced in 1955, held that in ordinary "run of the mill" towage situations, a release from liability granted by the tow to the tug would be considered as unenforceable for two main reasons: "(1) to discourage negligence by making wrongdoers pay damages and (2) to protect those in need of goods or services from being overreached by others having power to drive hard bargains."[34]

It is to be noted that *Bisso* was decided by an eight-man court, only four of the Justices voting in favor of the rule announced by Mr. Justice Black, speaking for the majority. Mr. Justice Frankfurter, supported by Justices Reed and Burton, dissented, and Mr. Justice Douglas concurred specially because of the deficiency found in the *Bisso* record, which did not convince him that the economies and organization of the tugboat industry required a rule contrary to what he conceived the rule of *The Syracuse*[35] to be. Although it is counsel's submission that the *Bisso* case reached an unwarranted result and that the result was not justified by the practice and almost universal custom of the industry, we nevertheless recognize, as we must, the existence of the rule announced in 1955.

We submit, however, that if this record had been presented to this Court in lieu of that presented in the *Bisso* case (the latter being completely silent on the economics of the situation), the result would have been different. Here it has been shown by a preponderance of the evidence that there was no economic power vested in Crescent which could have enabled it to coerce an unwilling customer,[36] and that this agreement was reached only

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[33] *Boston Metals Co. v. The Winding Gulf*, 349 U.S. 297 (1959).
[34] *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 at 91.
[35] 12 Wall. (79 U.S.) 167 (1871).

after negotiation at arm's length between two parties with equal bargaining power. In these days of expanding insurance markets, there can be no question but that both parties to a towing contract can carry insurance covering identical liabilities. Such insurance existed here. The question, therefore, is not whether one or the other had an economic power to drive a hard bargain, because such a power could not exist in the face of the competition shown to have been present; the question rather is which underwriter, Crescent's or Dixilyn's, ultimately will be required to bear the loss from the collision. The question is one of price, not policy.

Moreover, due to the availability of insurance (and its presence in this case on both barge and tug), no possible deterrent as to negligence is inherent in the release clause of the towage contract. Mariners generally are keenly aware of the legal rights and liabilities of their owners, and the reputation of a master is at stake each time he mounts the bridge of his ship. Any master who is known to be a negligent navigator soon finds himself on the beach, not only because of the owner's desire to protect his own reputation as an operator, but also because of the necessity of keeping his insurance costs down. As is shown here, the existence of insurance in the maritime field does not relieve the owner from additional costs in the event of the payment of a claim; claims are charged against the owner, and his experience rating and premium cost rises in direct proportion to the number of claims paid.[37] Even with insurance, therefore, owners still seek to discourage negligence and to require careful and prudent navigation.

Assuming, however, that the *Bisso* decision was rightly decided, it is submitted that there is here presented a

[36] Record, p. 83, ff.
[37] Record, P. 91.

situation which calls for the application of the rule suggested by Mr. Justice Harlan in *Southwestern Sugar*. There was involved in *Southwestern Sugar* a tariff provision releasing the vessel owner from liability for negligence. The clause was held not to be illegal *per se*, even in the face of the argument that *Bisso* precluded its enforcement, because of the clause having been incorporated in a tariff on file with the Interstate Commerce Commission. The Court stated, however, in the course of Mr. Justice Harlan's majority opinion, that if the peculiar hazards involved in towage are great and the method of guarding against the hazards are unsatisfactory, it may be that the federal courts "should creatively exercise their responsibility for the development of the law maritime to fashion a particularized rule to deal with particularized circumstances."[38]

This is exactly what the Court of Appeals for the Fifth Circuit has done in the instant case. It was found by Judge Rives that this case was one where "a particularized rule should be fashioned." His finding is amply supported by the evidence of the size and shape of the drilling barge, its lack of maneuverability, and the hazards which were inherent in raising and lowering the legs during the course of the downriver movement when going under bridges. Petitioner attacks the validity of the exception to the *Bisso* rule fashioned by the Court of Appeals pursuant to the admonition of *Southwestern Sugar* by charging that there were adequate ways by which the hazards could be guarded against, but these "adequate ways" are simply an application of the old saw—the "but-for" rule.

Petitioner argues that two conditions precedent must

[38] *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 419.

be present for the suggested rule of *Southwestern Sugar* to be invoked. These are that "(1) the peculiar hazards involved in towing a barge supplied by the shipper are great and (2) the methods of guarding against those hazards (are) uncertain."[39]

The argument is developed then that the hazards here were not great, because there could be a simple adjustment made in the position of the legs on the barge when navigated under bridges; and that the methods of guarding against the hazards were not uncertain because more horsepower or additional tugs could have been placed on the barge, which would have foreclosed the possibility of the collision.

Both arguments, of course, involve the resolution of questions of fact which are not presently before the Court and which may not be developed because of the record herein having been abbreviated to eliminate the factual testimony. Since, however, petitioner has seen fit to argue the facts, the argument must be answered briefly.

In the first place, the hazards involved in this tow are not limited to the particular accident which gives rise to this litigation. Certainly everyone having even the slightest connection with the maritime field and knowing the specifications of the *Julie Ann* would be aware of the numerous hazards to be encountered in towing the drilling barge from Vicksburg to New Orleans. These hazards were not limited to a transit under the Natchez-Vidalia bridge, but would include the necessity to pass under several power lines and at least two other bridges, passing large oceangoing ships, passing numerous tows, some having a length greater than that of the Queen Mary, passing fleets of moored barges, and all in a notoriously

[39] *Id.* at 419.

treacherous river with a strong current and numerous eddies. Even if the only problem had been transiting the Natchez-Vidalia bridge, the hazard of moving this barge with 144-foot-long legs, on the bottom of which were tanks 35 feet in diameter, should be obvious. The surface of the river being 92.4 feet below the bottom of the bridge and the river depth being only 55 feet just above the bridge,[40] simple arithmetic shows that it was impossible to lower the legs to such an extent as to permit safe clearance until the last moment before going under the bridge. Moreover, there was a conflict in the testimony as to whether the draft marks on the legs were correctly read and reported, and the duty of controlling the legs was clearly imposed on the Dixilyn crew who were operating the barge. The only personnel of Crescent aboard the barge at the time of the accident was the master of its tug *Orleans*, who took that position solely and only for navigational reasons.

Moreover, petitioner argues that the method of guarding against the hazards of fouling the bottom of the bridge or fouling the bottom of the river with the legs could have been obviated by the simple expediency of adding more tugs to the tow. Though this may be true, a factual issue is again involved, and again this issue may not be resolved on the face of the record presently before the Court. There is a conflict in the testimony as to whether additional tugs would have done much good in stopping the drilling barge once it had been permitted deliberately to gain momentum and float downriver under the bridge, and there is also a conflict as to whose duty it was to judge how many tugs were required for a safe transit. Although the district court found Crescent at fault for not furnishing sufficient horsepower and also found the master of Crescent's tug guilty of negligence,

[40] Opinion below, Record p. 155.

it is Crescent's position that it was guilty of no negligence, and that the cause of the accident could be traced directly to the negligence and fault of the Dixilyn employees operating the legs of the *Julie Ann*. Moreover, as was pointed out above, if the Court of Appeals had reached this issue, it is probable that it would have reversed the district court on its finding of fact, for it said in the course of its opinion that:

> "A review of the district court's findings of fact would confront us with an extremely difficult decision."[41]

It is submitted that this case, involving the towage of a drilling barge where the legs of the barge were operated by the crew of the barge and where the hazard of fouling the bottom of the river or the bridge was admittedly great, Crescent had no opportunity to avoid or guard against the hazard of the operation of the legs by the members of the crew of the barge, over whom it had no control. This case is singularly within the scope of the doctrine espoused by Mr. Justice Harlan in *Southwestern Sugar*, and calls for the inferior courts under our system of adjudicating maritime matters to fashion a rule to fit these circumstances involving extra hazardous undertakings in the field of towage.

The *Bisso* case, we submit, was improperly decided on an incomplete record. Towage, of course, partakes in some instances of common carriage, in others of transportation, and in still others of pure towage in the usual and accepted sense of the word. For example, there are innumerable regulated companies operating on the inland waterways of the United States which own their own towboats and barges and which operate as common carriers under Part III of the Interstate Commerce Act. River

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[41] *Id.* at p. 154.

Terminals Corporation, the respondent in *Southwestern Sugar*, is an example of such a carrier; Mississippi Valley Barge Line Company, the unsuccessful respondent in *Labelle*[42] is another such company. It is to those companies that Mr. Justice Black referred in his majority opinion in *Bisso*.[43] The common carrier towers on the inland waterways are, to a large extent, the owners of those transportation lines which are described in the publications of the Corps of Engineers, U. S. Army, referred to in Mr. Justice Frankfurter's dissent in *Bisso*.[44]

A second category of "towers" is exemplified by the unregulated carriers of merchandise for hire, one of which was before the Court in *Sacramento Navigation Company v. Salz*.[45] It is to be recalled that this company was held to be a common carrier under the facts involved in that case, and as such was entitled to the benefits of the Harter Act as to liability for damage to cargo loaded in one of its barges being towed by one of its tugs.

Finally, there is the tower who is the classic example of one furnishing motive power to a vessel such as is described in *Stevens v. The White City*,[46] *Sun Oil Co. v. Dalzell Towing Co.*,[47] and many other cases. Into this latter category fall the numerous tugs engaged throughout the world in furnishing harbor towage to vessels ranging in size from luxury passenger liners to small freighters.

It is submitted that the three classifications of towage should require the application of different rules of law as to damage claims. Insofar as carriage is con-

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[42] *Mississippi Valley Barge Line Co. vs. T. L. James & Co., Inc.*, 244 F. 2d 263 (5th Cir. 1957), cert. den. 355 U.S. 871, motion for leave to file petition for rehearing denied 358 U.S. 901.

[43] 349 U.S. at 89 and at 91, fn. 9 and 18.

[44] 349 U.S. at 117; *f.* 14.

[45] 273 U.S. 326 (1926).

[46] 285 U.S. 195 (1932).

[47] 287 U.S. 291 (1932).

cerned, there should be no doubt but that a "tower" should be treated as a carrier when acting as a carrier. The transportation companies operating through the medium of tug and barge and carrying cargo certainly must be held to be carriers subject to the provisions of the Harter Act or the Carriage of Goods by Sea Act insofar as their relationship to cargo is concerned. The liability to the owner of the barge being moved, however, does not stem from the same theory as does liability to cargo. In the one case, statutory regulation of the carriage is involved; in the other towage is involved.

On the other hand, if six Moran tugs are engaged in landing the *Queen Mary* at Cunard's pier in New York City, those tugs are by no sense of the word engaged in "carrying" or "transporting" the vessel. They are engaged in towage, and towage, under Your Honors' rule, rightly is not classified as carriage. The obligations, therefore, of the operator of the tugboat as to the craft in tow are completely different from the obligations of the operator of a towboat pushing his barge of sugar along the Mississippi River to the owner of the sugar.

The fact is that the *Basso* decision has placed the transportation industry in the anomalous position of having imposed upon it a higher standard of care insofar as a towage contract is concerned than it has insofar as a contract of carriage is concerned. The anomaly is well pointed up by the following illustrative situation: A barge line owns and operates a tug and a barge, the latter loaded with sugar being transported between two river points in tow of the tug, which simultaneously is towing an empty barge belonging to a third party between the same points. If, through the negligence of the master of the tug, both barges are lost, the tug operator has an immunity from liability to the cargo owner, for under the

Harter Act and the Carriage of Goods by Sea Act, damage to cargo resulting from negligent navigation is excused.[48] On the contrary, even though the tug owner were to have entered into a contract with the owner of the empty barge whereby he was relieved from liability for negligent navigation, that clause in the contract would be void under the rule of the *Bisso* case. It is submitted that this anomaly must not have been called to the attention of the Court at the time that *Bisso* was argued, for it is hard to understand how, with traditional imposition by our law of the highest standard of care on a carrier, a tower could be held to an even higher standard.

It is submitted that *Southwestern Sugar* indicates a trend by Your Honors to get away from the *Bisso* rule. In that case, of course, there was a dissent on the basis of there being no power in the Interstate Commerce Commission to approve a tariff containing a legally invalid condition, but the majority opinion, though recognizing the argument, rightly overlooked it in order to permit the parties to go to the Commission to determine if there existed any justification for the release clause contained in the tariff. It is our submission that the decision in *Southwestern Sugar* is clearly correct. It may be, on the rivers, that owners of towboats may have mutual arrangements to tow each other's barges on a release basis; all types of considerations, such as reduced or alternative rates, can enter into the question of whether it is economically sound to permit a release to be incorporated in a towage contract, just as it is sound to hold that extraordinary hazards give rise to a permission to use extraordinary measures to obtain relief from the liabilities which might be incurred by virtue of the hazards.

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[48] *Sacramento Navigation Co. v. Salz, supra*; Harter Act, § 3 (Act of Feb. 13, 1893, 46 U.S.C. 192); Carriage of Goods by Sea Act, § 4 (Act of April 16, 1936, 46 U.S.C. 1304(2)(a)).

It is to be noted that in at least one case[49] decided since this Court announced its decision in *Bisso*, an exculpatory clause in a towage contract where it was contemplated that the tow would be made through ice was maintained on the theory that the extraordinary risk took the case out of the prohibited area.

Freedom of contract and the economics of this industry require that extraordinary situations be given extraordinary treatment, and we earnestly submit that there is no reason why this contract should not be maintained as written on all of the grounds discussed.

THE MEASURE OF DAMAGES

Petitioner's application for a writ of certiorari set forth two questions which were presented to the Court, but in its brief, a third matter, the measure of damages issue, has been engrafted on the application. It is submitted that this matter is not properly before the Court and that it should not be reached. If, however, the Court determines to consider the point as raised, it is our submission that it has no merit.

The *Wampler*[50] case stands alone in the jurisprudence. The portion of the decision which is relied upon is purely *obiter dicta*, and in addition, the case is distinguishable on the grounds set forth in Judge Rives' opinion below. In *Wampler*, the Court relied on a Texas case holding that where a party contracted to procure certain insurance coverage and failed to conform to his obligation, if the other party procured the proper type of insurance at an increased premium, the measure of damages for the breach of contract was the amount of the premi-

[49] *North River Barge Lines v. Chile Steamship Co.*, 214 F. 2d 882 (2nd Cir. 1954).

[50] *Standard Oil Co. v. Wampler*, 218 F. 2d 768 (5th Cir. 1955).

um. *Wampler* obviously has no application here, because Dixilyn for itself and its underwriters, agreed that its insurance would inure to Crescent's benefit and this accident occurred before Crescent was put on notice that Dixilyn and its underwriters would claim that the insurance was not available to cover the claim.

CONCLUSION

Respondent respectfully submits that the contract involved in this case must be interpreted in such a manner as to reach the result which the parties intended; that it is clear that the parties intended to shift the liability for the claim which is the subject of this litigation from Crescent to Dixilyn; and that they validly could do so. The decision below was right in all respects and should be affirmed.

Respectfully submitted,

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January 17, 1963